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No. 1

In The

Supreme Court of the United States

AURELIO ROSADO; LYDIA ROSADO;
AND THEIR CONJUGAL PARTNERSHIP,

Petitioners,

v.

WACKENHUT INTERNATIONAL, INC.;
WACKENHUT PUERTO RICO, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether under the Age Discrimination in Employment Act (29 U.S.C. § 623(a)), the Court of Appeals erred in requiring, in addition to sufficient pretext evidence, direct evidence of discriminatory intent.

PARTIES TO THE PROCEEDINGS

Petitioners are Aurelio Rosado, Lydia Rosado and their conjugal partnership.

Respondents are Wackenhut International Inc. and Wackenhut Puerto Rico Inc., a wholly owned subsidiary of Wackenhut International Inc.

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PETITION FOR A WRIT OF CERTIORARI

Counsel for Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, (Pet. App. 1) is not reported. The order of the District Court, (Pet. App. 12) granting summary judgment against Petitioner is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 29, 2005. A timely petition for rehearing was denied on February 6, 2006. Pet. App. 31. The jurisdiction of this Court for this petition of a writ of certiorari rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Age Discrimination in Employment Act, 29 U.S.C. § 623(a) provides, in pertinent part: "It shall be unlawful for an employer . . . to discharge an individual . . . because of such individual's age. . . ."

Federal Rule of Civil Procedure 56 provides, in pertinent part:

> (c) . . . The judgment sought shall be rendered forthwith if the pleadings, the positions,

answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT

This case is likely to clarify and determine the standard of proof required in cases where Petitioners lack direct evidence of discrimination. It is a case that arises in the context of a summary judgment granted by the Court of Appeals for the First Circuit, on the basis that there was no evidence showing age discriminatory animus. It portrays the inconsistent treatment that Circuit Courts have provided to this Court's initial attempt set forth in *Reeves v. Sanderson Plumbing*, 530 U.S. 133 (2000) to clarify the role of pretext in the evidentiary framework for proving discriminatory intent. The Court of Appeals, along with several Circuit Courts, have misconstrued the *Reeves* holding, directing that evidence of pretext alone may be sufficient to prove discriminatory intent, into a *de facto* pre-*Reeves* regime of pretext-only/pretext-plus forums. In this case the Court of Appeals, acting in sync with its express acknowledgement that its pre-*Reeves* decisions were consistent with said holding (*Feliciano v. El Conquistador*)[1] analyzed the evidence submitted in the scenario of

[1] 218 F.3d 1 (1st Cir. 2000) is a judgment issued six days before *Reeves*. After the *Reeves* opinion was issued, Feliciano petitioned for a rehearing on the basis of inconsistency with the Court's opinion in her case. *Feliciano, Id.* at 9. Her petition was denied given that the June 6 opinion was considered "consistent" with *Reeves*. *Id.* at 10.

summary judgment through its construction of the *Reeves* standard as requiring more than pretext.

Petitioners' opposition to summary disposition and statement of contested material facts in controversy complied with the required burden of proof for both his ADEA and ADA claims. Petitioners satisfied each and every one of the elements for a *prima facie* case of ADEA and ADA as well as his burden of establishing that the Respondents articulated legitimate non-discriminatory reasons for termination are a pretext covering up discrimination. There is sufficient evidence for a reasonable jury to find mendacity in Respondents' explanation for Petitioners' termination which, coupled with his *prima facie* case, provides the required evidence to survive summary judgment.

(i) Aurelio Rosado: Evidence of Age Discrimination

Rosado is a 60-year-old man, citizen of the United States and resident of the Commonwealth of Puerto Rico, married to Co-Petitioner Lydia Rosado. He is a retired police sergeant and an honorably discharged Vietnam veteran who during 1973-76 worked at Wackenhut Puerto Rico (WPR) as its Investigation Division Manager. He left WPR to work in the private investigation industry until 1989, when he was called back by WPR to become its new General Manager. As a General Manager in Puerto Rico, Rosado was responsible for overseeing the company business in the island.

Fernando Carrizosa, (Carrizosa) Wackenhut International (WI) President until around the third quarter of 2001, was Rosado's supervisor. On or about mid-2001, Carrizosa was replaced by William Morrow (Morrow) as

President of WI. In addition to the President, Rosado also reported to WI Vice-President, Fernando Hegel (Hegel).

Throughout his tenure as General Manager, from January 30, 1989 until July 12, 2002 – the date of his termination, Rosado's performance was always satisfactory, competent and in many ways exceeded the company's standards. He received commendations, performance bonuses (including a $46,000 bonus check in 1999 and a $23,000 bonus check in 2000) as well as salary increases during these years.[2] Wackenhut never reprimanded Rosado for his performance nor informed him about any possible deficiencies, which if uncorrected, could lead to his termination.

WPR, like WI, sells security devices and provides diverse security services, including contracting security guards and installing alarm systems. WPR offers services to both the public (governmental agencies) and the private sector in Puerto Rico. WPR General Manager reports directly to the President and Vice-President of Wackenhut International (WI).[3] The WI President is, for all practical purposes, the supervisor of WPR's General Manager and the president of a very informal Board of Directors of WPR.[4] The WI Presidents hire the WPR General Manager, establishes his compensation package and directs the governance of WPR offices in terms of reporting, requiring monthly reports, balance sheets, Profits and Loss statements (P&L) or any other operational report.[5]

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[2] Petitioners' Court of Appeals Appendix at 306-308.

[3] Petitioners' Court of Appeals Appendix at 293.

[4] Petitioners' Court of Appeals Appendix at 293.

[5] Petitioners' Court of Appeals Appendix at 294-295; 298-302.

Notwithstanding Rosados' discretion as general manager, the President of WI has the last word with respect to the budget and the managers' corporate plan.[6] Said President also has the last word about prices and, thus, the manager is prevented from offering lower prices, even when he deems this strategy as the most efficient in the long run.[7]

On April 15, 1998, Rosado suffered a cardiac arrest. He was in recovery, out of his job for forty (40) days. After said period of time Rosado returned to work and continued performing competitively and satisfactorily.[8] As an example, between the years 1998 until the end of 2000, WPR reached a peak in revenues which amounted to $33 million a year.[9] At that time the Company's economic structure was built upon four (4) to five (5) government contracts which, although not leaving a profit, helped the company cover all its obligations, overhead and fixed expenses.[10] This permitted the Company to allocate as profit all of its contracts with the private/non-governmental sector. Rosado was very concerned with the fragile platform that government contracts built for the overall business, given the government's track record of late payments and the temporary nature of such contracts, being subject to the shifting political winds.[11] Consequently, even when WPR was making a yearly $33 million profit, Rosado kept always bringing to Carrizosa and Hegel's attention the

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[6] Petitioners' Court of Appeals Appendix at 297-298; 330-333.

[7] Petitioners' Court of Appeals Appendix at 330-333.

[8] Petitioners' Court of Appeals Appendix at 306; 308-309.

[9] Petitioners' Court of Appeals Appendix at 316; 323.

[10] Petitioners' Court of Appeals Appendix at 279 ¶8; 327.

[11] Petitioners' Court of Appeals Appendix at *Id.*

need to change the business approach.[12] Because of this situation, Rosado even went as far as taking the decision of not bidding for several government agency contracts.[13]

Rosado consistently offered suggestions and recommendations for preventing a critical economic situation and seized the opportunity provided by conversations taking place around his performance evaluation to discuss these issues with Carrizosa and Hegel. Rosado argued that, in order to be competitive, WPR would have a firmer foundation if it moved away from the government contracts while simultaneously lowering the profit expectation for private contracts.[14] However, Carrizosa's and Hegel's responses were always the same: "Rosado, in theory that looks alright but I cannot lower the prices, because headquarters would not allow it."[15] Rosado's hands were tied-up by the fact that WI controlled the pricing for all WPR bids and did not allow him to lower the prices.[16] Carrizosa and Hegel were essentially the ones making the final determination on every bid.[17]

Rosado's predictions regarding government contracts materialized. Between the end of the year 2000 and the beginning of the year 2001, WPR lost all government contracts in bidding processes.[18]

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[12] Petitioners' Court of Appeals Appendix at 327-329.

[13] Petitioners' Court of Appeals Appendix at *Id.*

[14] Petitioners' Court of Appeals Appendix at 279 ¶8; 319-322.

[15] Petitioners' Court of Appeals Appendix at 279-281 ¶11; 321.

[16] Petitioners' Court of Appeals Appendix at 281; 330-331.

[17] Petitioners' Court of Appeals Appendix at 316-317.

[18] Petitioners' Court of Appeals Appendix at 329.

– Rosado's Successor

When Morrow became WI President, Hegel became the point person at WI in charge of the WPR affairs, and the former, learning of the financial losses of WPR during the year 2000-2001, agreed with Hegel's decision to send Griffey, less than 40 years old, to WPR for the scheduled yearly audit[19]. At that point in time Griffey held the position of Field Support Operations for WI. Furthermore, Griffey was asked by Hegel to perform a financial analysis of the situation in Puerto Rico, labeled as a sensitivity report.[20] Griffey had no knowledge of the Puerto Rico operations and the particularities of the Puerto Rican market.

– Griffey's Sensitivity Report

A sensitivity report is an analysis of the specific hours of services the agency needed to sell in order to catch up with the business loss. This entailed reviewing line by line WPR revenues and expenses. Furthermore, during the preparation of this sensitivity report both Hegel and Griffey were constantly providing Carrizosa with information regarding suggestions for improving profits, such as how many hours WPR needed to sell, and how many expenses needed to be reduced.[21]

From the outset Griffey's *modus operandi* disregarded Rosado's input. In fact Griffey never met with Rosado during the four (4) months that it took for the preparation

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[19] Petitioners' Court of Appeals Appendix at 311-312.

[20] Petitioners' Court of Appeals Appendix at *Id.*

[21] Petitioners' Court of Appeals Appendix at *Id.*

of said study,[22] concluded at some point between July and October 2001.

Around this time Hegel prepared an evaluation of Rosado's performance for the year 2000 that was never discussed with him. Apparently, he was waiting for the conclusion of the sensitivity report in order to discuss it with Rosado. However this meeting never took place and there is no explanation or any justification offered for this.[23]

– Rosado's Actions

During the year 2001, Rosado kept explaining to Hegel that WPR had to lower the rates per hour in order to increase revenues and be competitive. For Rosado it was a simple business decision that involved two choices, either you sell at a lower rate in order to recover the lost business or you recover internally to reduce your cost. Furthermore, on several occasions, Rosado wrote to Hegel his concerns and suggestions in order to alleviate the impact of lost government contracts. He never received any response concerning his recommendations.[24]

– The Action Plan: Griffey Takes Over

On or around Friday, February 1st, 2002, Morrow and Hegel met with Rosado in the WPR offices; the first time Rosado personally met Morrow to discuss WPR operations.

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[22] Petitioners' Court of Appeals Appendix at 282; 326.

[23] Petitioners' Court of Appeals Appendix at 311.

[24] Petitioners' Court of Appeals Appendix at 279-281 ¶¶ 8-10; 320-322; 327-328.

The meeting lasted 20-25 minutes.[25] Rosado first learned about Griffey's sensitivity report's conclusions. As a direct result of the sensitivity report, Morrow requested from Rosado a *Puerto Rico Operations Action Plan* and thus gave Rosado "a second chance" notwithstanding the fact that he had been informed, according to corporate officers' testimony, of his incompetence.[26]

Four days later, Rosado suffered a second cardiac arrest which kept him away from his job for fifty-five (55) days.[27]

After Rosado's heart attack, Griffey was assigned to run the PR operation. No one notified Rosado about this appointment.[28] On several occasions, while Rosado was recovering at home, he was contacted by Griffey to discuss several job-related issues, specifically the Action Plan requested by Morrow on February 1st 2002.[29] In said discussions, Rosado disagreed with some of Griffey's ideas and made it clear he disapproved of the latter's proposals. Rosado, not having received any contrary information, believed he still held the General Manager's position. However, Griffey assumed this role and constantly made managerial decisions without Rosado's consent.[30]

The official nature of Rosado's replacement as General Manager took some time to be revealed. On or about April 2002, there were more than a few occasions when Rosado,

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[25] Petitioners' Court of Appeals Appendix at 332.

[26] Petitioners' Court of Appeals Appendix at 331-333.

[27] Petitioners' Court of Appeals Appendix at 11-12; 283-84 ¶17-18.

[28] Petitioners' Court of Appeals Appendix at 11-12; 283 ¶18.

[29] Petitioners' Court of Appeals Appendix at 11-12.

[30] Petitioners' Court of Appeals Appendix at 11-12.

after his return to work, attempted to find out exactly the scope and extent of Griffey's authority and how his position and employment was affected. He discussed the issue with Griffey himself, who claimed that he was not sure of his status in the company.[31] He also discussed the issue with Hegel who either avoided the subject or claimed total ignorance.[32]

After Rosado's return to work, business was run differently. The staff was clearly following Griffey's instructions and work was done when Griffey instructed so.[33] On several occasions employees expressed Rosado their concern, given their uncertainty about Rosado's authority, and thus not knowing how to respond to his requests.[34] In the midst of this situation a Wackenhut colleague from El Salvador asked Rosado a "retirement" question. On or about a month after Rosado's return to work, he received a call from Miguel Angel Escobar, the President of Wackenhut/El Salvador, well connected to VP Hegel, who originally worked at El Salvador's offices. During the conversation Mr. Escobar asked Rosado on several occasions "why don't you retire?" He said that things would probably be easier for everybody if he did. For Rosado this phone call was very unusual, given its personal tone and nature and given the fact that he did not have a previous relationship with Escobar.[35]

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[31] Petitioners' Court of Appeals Appendix at 11-12; 283-84 ¶18.

[32] Petitioners' Court of Appeals Appendix at *Id.*

[33] Petitioners' Court of Appeals Appendix at 12.

[34] Petitioners' Court of Appeals Appendix at 12-13.

[35] Petitioners' Court of Appeals Appendix at 12-13.

Approximately a month after his return, much to his surprise, Rosado learned, by email of a general company report listing company managers, including Griffey as Associate General Manager. (App. at 13) He could not figure out how WPR, during stressful economic times, decided to hire another manager nor the reasons for not informing him of this fact.[36] Notwithstanding said official announcement, Griffey's answer to Rosado's questions was that he was unaware of his position title.[37] Griffey's *curriculum vitae*, however stated otherwise and described him as WPR General Manager since January 2002.[38] This situation remained unaltered until July 12, 2002, the day Rosado was discharged. Hegel and Griffey met with Rosado and informed him both of his termination and that Griffey would replace him as General Manager. **July 12 also was Griffey's 40th birthday.** No specific reason was given for Rosado's termination.[39]

Although Hegel told Rosado he did not know the reasons for his termination, Morrow's testimony states that Hegel participated in the decision to terminate Rosado.[40]

(ii) Wackenhut's Articulation of Reasons for Discharge

Respondents have articulated as legitimate nondiscriminatory reasons that Rosado was terminated due to:

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[36] Petitioners' Court of Appeals Appendix at *Id.*

[37] Petitioners' Court of Appeals Appendix at 11-12; 283-84 ¶18.

[38] Petitioners' Court of Appeals Appendix at 287 ¶7.

[39] Petitioners' Court of Appeals Appendix at 11-13; 283.

[40] Petitioners' Court of Appeals Appendix at 286-87 ¶24.

(1) his performance; (2) his lack of initiative; (3) failure to provide a comprehensive action plan; (4) failure to show signs of improving the critical situation in WPR. The District Court in its Opinion and Order determined that Respondents have met their task. Consequently, the presumption of discrimination created by the *prima facie* case drops away and the burden of production shifts back to Rosado to show that Wackenhut's stated nondiscriminatory reason was a pretext for discrimination.

(iii) Rosado's Evidence of Pretext

The Court of Appeals erred in ignoring Rosado's compliance with the *Reeves* evidentiary framework having presented sufficient pretext evidence of the falseness of Defendants' reasons for his termination, thus allowing it to conclude that Wackenhut unlawfully discriminated.

– The Court of Appeals' Enforcement of a *de facto* Pretext-Plus Standard

The Court of Appeals, in its misconstruction of the *Reeves* standard and in requiring that Rosado "produce evidence beyond the mere assertion that the alleged justification is implausible and show the that the employer's anti-discriminatory animus actually motivated the adverse employment action," held that the record is "devoid of any sign of anti discrimina[illegible] animus toward Rosado."[41] The Court, searching for direct e[illegible]nce, concluded

[41] Petitioners' Court of Appeals Appendix at p 8-9.

that Rosado "fails to cite any material fact in controversy in the record."[12]

The Court missed important considerations in the analysis of discrimination cases, to wit, the significance of assessing the whole picture, proximity in time, and the employer's control of information. These considerations shed light on the ever-elusive question of discriminatory animus/intention. Of particular relevance is the fact that in discrimination cases the events closer in time to the adverse employment action acquire special significance in terms of revealing Respondents' animus, given the nexus and proximity. Furthermore, all the reasons given by the employer for terminating an employee must be truthful, given that the employer is the one in control of the information and of the decision-making processes.

Rosado presented evidence of his last six months of employment against the backdrop of the contradicting events taking place during 2001 in which everyone blamed each other for the loss of government contracts.

Griffey's sensitivity report was being prepared during the last six months of 2001. Wackenhut's corporate officers' deposition testimony assert that Rosado was aware of the sensitivity report and discussed the same with Griffey and Hegel, a fact that Rosado denies. It is admitted by Griffey that Rosado had no input whatsoever on his communications with both Morrow and Hegel regarding said report. Falseness and contradictions in the testimony of Wackenhut's officers reveal the discriminatory animus behind Rosado's replacement by Griffey.

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[12] Petitioners' Court of Appeals Appendix at p 8-9.

On February 2002, Morrow visited the island and gave Rosado "a second chance" notwithstanding the fact that he had been informed, according to corporate officers' testimony, of his incompetence. As a direct result of the sensitivity report, Morrow met with Rosado on February 2002 in his first visit as President, and requested a *Puerto Rico Operations Action Plan*. During that meeting Rosado first learned about Griffey's sensitivity report's conclusions. Rosado argued that it was therefore reasonable to conclude that in asking Rosado for a *Puerto Rico Operations Action Plan* and by stressing the necessity of *righting the ship* before it was too late, Morrow was giving Rosado the opportunity to improve the company's economic situation.

Consequently, in its *de novo* review the Court of Appeals had to determine whether there was sufficient evidence in the record for a trier of fact to conclude that said offer was a real opportunity or just a false gesture in a discriminatory cover-up scheme. The deposition testimonies of Respondents' corporate officers unsuccessfully attempt to state that it was a real chance. Notwithstanding, their actions after the February 2002 meeting and their contradictory testimony support a thick inference of mendacity in the ranks.

Company officers testified that they brought Griffey to Puerto Rico as Assistant General Manager for Puerto Rico operations with two main objectives: (1) prepare a report and recommendation of the Action Plan requested from Rosado and (2) to "hold the fort" and offer support for WPR during Rosado's absence.[43] However, Griffey's *curriculum vitae* reveals that he had been WPR General Manager

[43] Petitioners' Court of Appeals Appendix at 32-35.

since January 2002.[44] Since Griffey's arrival on February 2002 both he and Hegel, avoided Rosado's questions regarding Griffey's position at WPR. Furthermore, Griffey lied to Rosado when he stated that he was uanaware of the position held by him in the Island. Rosado's testimony proves that after Griffey's arrival, he never again exercised the WPR General Manager's authority.

Rosado also presented evidence showing that his alleged failure to submit an Action Plan was also a false justification to cover up Defendant's discriminatory animus. The Action Plan was asked from Rosado right before he suffered the second cardiac arrest that sent him home for more than fifty-five (55) days and, during his convalescent period, he helped Griffey prepare what he thought was the requested Action Plan.

Wackenhut's position that the non-submission of said plan during Rosado's convalescent period amounted to non-compliance with corporate instructions, or lacked of initiative in his part was contradicted by facts showing that during his recovery at home, Rosado helped Griffey prepare what he thought was the requested Action Plan.

A close look at the chronology of events once Rosado returned to work after his convalescent period reveals WI and WPR cover up story regarding Rosado's inaction and his failure to submit an action plan. Only days after Rosado's return, Hegel welcomed him back with an e-mail requesting that the action plan be presented as soon as possible.[45] Rosado immediately sat down with Griffey to

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[44] Petitioners' Court of Appeals Appendix at 287.

[45] Petitioners' Court of Appeals Appendix at 36-37 ¶21.

discuss his action plan (the one to which Rosado offered input during his convalescence period). Although he was not completely convinced about the same, Rosado agreed with it given that, under the circumstances, he had no other options.[46]

Notwithstanding the fact that the action plan was approved by Hegel on May 17th, 2002 and an order for its implementation came from WI,[47] Rosado was terminated two months later because of his lack of initiative and his failure to submit an action plan. Furthermore, on the date of Rosado's termination, Hegel tells Rosado that he doesn't know the reasons for his dismissal, while Morrow testifies in his deposition that Hegel was a co-participant in the decision to dismiss him. Specifically, he testified that he did discuss with Hegel the whole company situation and that both arrived at the conclusion that Rosado had to be terminated.[48]

(iv) Preclusion of Summary Judgment and Inferences for the Jury

This is a case that fully meets the *Reeves* evidentiary standard, one in which the jury should be asked to infer the intentional discrimination from the following: (1) Rosado was a 60-year-old excellent General Manager capable of driving WPR to its peak in sales; (2) At the time of his termination he had no performance problems; (3) A year before his termination a new company president

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[46] Petitioners' Court of Appeals Appendix at 385 ¶22.

[47] Petitioners' Court of Appeals Appendix at *Id.*

[48] Petitioners' Court of Appeals Appendix at 286-87 ¶24.

arrived; (4) Six months after his appointment, said President asked Rosado for the first time for an Action Plan for the WPR operation; (5) After a cardiac arrest and 55 days of recovery Rosado submitted such action plan in conjunction with Griffey; (6) Griffey stripped Rosado from his General Manager's authority after his heart attack; (7) Rosado was terminated from employment because of his failure to submit an action plan and to "right the ship"; (8) Griffey, the person that submitted the Action Plan with Rosado and who had *de facto* authority to right the ship, replaced Rosado in his position as General Manager.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has joined a group of circuits which misconstrue the sufficiency of evidence required to prove discriminatory intent, absent direct evidence. As stated above, these circuits are restoring *the pretext/plus-pretext/only* dichotomy, which preceded the *Reeves* decision, and which followed *St. Mary's Honor v. Hicks,* 509 U.S. 502 (1993). In addition to legitimizing the inconsistent position of plaintiffs in different circuits, the Court of Appeals along with some other circuits, are sapping the vital strength of an evidentiary framework precisely designed to address the difficulties of proving – *via* direct evidence – discriminatory intent. This Court has acknowledged that discrimination can be subtle and that employers have total control of the evidence.

Ever since *Reeves*, the Court of Appeals for the First Circuit (which expressed in *Feliciano v. El Conquistador*

that its pre-*Reeves* *pretext-plus* court-label was unsupported, since *Reeves* involved no significant change to its understanding of the quantum of evidence in these cases)[49] and its companion circuits, have interpreted this Court's holding through the prism of an inverted construction. The Court of Appeals unduly restrains and places at the margins the *Reeves* norm allowing a determination of intentional discrimination from sufficient evidence of pretext. The qualifications and limitations created to underscore its non-absolute character, exemplified by the verb "may permit" became center stage, and an open invitation for requiring discriminatory animus evidence, beyond pretext. (The fact-finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination) *Reeves, supra*, at 511. This reality has signaled a difficult journey for plaintiffs for whom this Court has consistently recognized a distinct evidentiary framework attuned to the realities of employment discrimination.[50] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Often, the *Reeves* qualification/limitation/exception language is used to validate pre-*Reeves* decisions, including those specifically targeted by the *Reeves* court as improperly requiring *pretext-plus*. As the Court of Appeals

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[49] *Feliciano v. El Conquistador, supra* note 1.

[50] Michael J. Zimmer, *Leading by Example: An Holistic Approach to Individual Disparate Treatment Law*, 11 Kan. J.L. & Pub. Pol'y 177, 185 (2001) cited in Brent L. Ryman, *Lame Duck Precedent: a Comment on the Summary Judgement Framework for Disparate Treatment Cases After Reeves v. Sanderson Plumbing*, 71 U. Cin. L. Rev. 669 (2003)

has done in the First Circuit,[51] the Court of Appeals for the Fifth Circuit has underscored that *Rhodes v. Guiberson Oil Tools,* 75 F.3d 989 (5th Cir. 1996), one of the cases that *Reeves* sought to overturn, was consistent with *Reeves. Vadie v. Mississippi State University,* 218 F.3d 365 (5th Cir. 2000).[52]

The Second Circuit, which *de facto* also requires additional direct evidence, has taken a similar path. *Fisher v. Vassar College,* 114 F.3d 1332 (2d Cir. 1997) – another specific case targeted by the *Reeves* court – was expressly held to be consistent with *Reeves. Schnabel v. Gary Abramson,* 232 F.3d 83 (2d Cir. 2000). In stating that the Supreme Court's reading of *Fisher* was inaccurate, the Court of Appeals noted that "the Court did not categorically conclude that a *prima facie* case plus pretext evidence 'permits' a trier of fact to find that a plaintiff has satisfied his ultimate burden" and instead used the language "may permit." In fact the Court went on to state that "if *Reeves* had ended here, we would have little choice but to reinstate plaintiff's ADEA claim in the instant case." By stating the "not always" language sustaining liability, *Reeves* opened the door for a judgment in favor of the employer if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision. *Id.* at 90.

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[51] *Feliciano v. El Conquistador, supra* note 1.

[52] The *Rhodes* language found consistent with *Reeves* stated:

> . . . Thus, a jury issue will be presented and a plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complains.

Excessive reliance on the "additional evidence" of discriminatory comments similar to those present in *Reeves*, creates additional confusing levels. Instead of focusing on the proper standard, the Courts have commonly engaged in a comparative hunt for *the comments*, with the *"coming over on the Mayflower"* and being *"too damn old to do his job"* as the hard act to follow in the *additional evidence* category. In *Vadie, supra*, the Court stated how in *Reeves* the Supreme Court noted substantial evidence by pointing "to comments and conduct of the defendant's supervisor reflecting an age-related animus" (at 374). Due to the absence of similar comments that Court held it was unable to make an inference of intentional discrimination, after the presentation of a *prima facie* case and plaintiff's evidence that the University's asserted legitimate reasons for not hiring him were false, given his superior credentials to the professor hired. The acceptable inference for the Court was instead that the University had an "unidentifiable" reason for not hiring the plaintiff. (*Id.* at 373)

The Court of Appeals in this case and in several post-*Reeves* decisions demonstrated that the confusion generated by *St. Mary's Honor v. Hicks, supra*, remained significantly unaltered. (See also *Weinstock v. Columbia Univ.*, 224 F.3d 33 (2d Cir. 2000); *Cleary v. Nationwide Mut. Ins. Co.*, 2001 U.S. App. LEXIS 11318 (4th Cir. May 31, 2001); *Rubinstein v. Adm'rs of the Tulane Educ. Fund*, 218 F.3d 392 (5th Cir. 2000); *Kulumani v. Blue Cross Blue Shield Ass'n*, 224 F.3d 681 (7th Cir. 2000); *Guyton v. Ottawa Truck Div.*, No. 00-3028 (10th Cir. April 27, 2001)).

Further review is warranted.

I. THE COURT OF APPEALS MISCONSTRUED THE *REEVES* PRECEDENT AND EXACERBATES CIRCUIT CONFLICT, DOCTRINAL INCOHERENCE AND PLAINTIFFS' INCONSISTENT TREATMENT BY SUSTAINING AN INCORRECT APPLICATION OF THE QUANTUM OF EVIDENCE STANDARD

The Court of Appeals did not hold that the pretext evidence presented by Rosado coupled with his *prima facie* case, in the context of a summary judgment, lacked evidentiary sufficiency for proving intentional discrimination. The Court instead analyzed the evidence Rosado presented, through the direct-evidence-requirement/*de facto* pretext-plus lens, and found it either nonexistent or insufficient The Court of Appeals, held that Rosado had to "produce evidence **beyond** the mere assertion that the alleged justification is implausible **and show** that the employer's discriminatory animus actually motivated the adverse employment action". (emphasis added) (only citing *Mesnick v. General Electric,* 950 F.2d 816 (1st Cir. 1991) a pre-*Reeves* decision, emblematic of a pretext-plus standard[53]).

Even under a correct *pretext-only* standard, *Mesnick* presented factual questions concerning the sufficiency of the evidence of pretext itself. An uncontested history of insubordination and well-documented evaluations in that case constituted evidence affecting the quantum and quality of the pretext evidence.

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[53] The Court held: "To be sure, Mesnick flooded the nisi prius roll with plethoric evidence designed to illustrate his professional competence and ability to work well with others – but the vast majority of Mesnick's evidence related to pretext *vel non.* **Regardless of its bulk,** this evidence had nothing at all to do with age or with the employer's true motives". (emphasis added)

– The Value of Circumstantial Evidence

The unanimous voice of this Court correctly understood the nature of circumstantial evidence and the role it plays in the absence of direct evidence when it held that proof of a false explanation "is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive". *Reeves, supra* at 147, citing *St. Mary v. Hicks, supra* at 517 ("[P]roving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination" .... Such an inference is consistent with the general principle of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt.") Citing *Wright v. West,* 505 U.S. 277, 296, 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992); and *Wilson v. United States,* 162 U.S. 613, 620-621, 16 S. Ct. 895, 40 L. Ed. 1090 (1896); 2 J. Wigmore, EVIDENCE § 278(2), p. 133 (J. Chadbourn rev. 1979). Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. Citing *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 577, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978) ("[W]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with *some* reason, based his decision on an impermissible consideration."). *Reeves, supra* at 14.

To undervalue the role of circumstantial evidence through the pretext-plus requirement, improperly and without any statutory basis, places discrimination cases in

a separate category of civil cases with more stringent evidentiary standards, an ironic result, given the Court's reiterated acknowledgement of policy considerations facilitating proof of discrimination.[54] It must similarly be noted that the *pretext-plus* – direct evidence – *de facto* requirement runs counter to the understanding of the applicable *preponderance of evidence* standard, thus imposing the higher burden of *clear and convincing* evidence, *St. Mary's Honor v. Hicks, supra* at 521-23. The risk encountered by a non-credible employer is not different from that awaiting any litigant whose version of the events fails to prevail.[55]

– Accurate Interpretations of *Reeves*

Other Circuits have correctly construed *Reeves* as precluding summary judgment by the probative value of pretext, understanding that the dispute as to the veracity of the employer's explanation "provides evidence as to the company's discriminatory intent . . . " *Ross v. Campbell Soup,* 237 F.3d 701, 708 (6th Cir. 2001). The Ninth Circuit adopts the premise that as a general matter plaintiff "need produce very little evidence in order to overcome an employer's motion for summary judgment." *Chuang v. University of California,* 225 F.3d 1115, 1124 (9th Cir. 2000); (See also *Goosby v. Johnson & Johnson Med Inc.,*

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[54] See also Michael E. Gold, *Towards a Unified Theory of the Law of Employment Discrimination*, 22 Berkeley J. Emp. & Lab. L. 175, 181 (2001), commenting on the rarity of egregious discriminatory comments. Larson, EMPLOYMENT DISCRIMINATION 8.01[1] at 8-7 (2d ed. 1994) ("employers are, on the whole, too sophisticated to profess their prejudices on paper . . . before witnesses").

[55] *Id.* at 374.

228 F.3d 313 (3d Cir. 2000); *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 854 (4th Cir. 2001) ("[A] prima facie case and evidence of pretext raises a sufficient inference of discrimination to entitle a plaintiff to survive a motion for summary judgment."); *Toth v. Gates Rubber Co.*, 2000 U.S. App. LEXIS 14374, at 25 (10th Cir. June 21, 2000) (finding contradictory evidence on the issue of pretext was enough to defeat summary judgment); *Munoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340, 1345-46 (11th Cir. 2000) (indirect evidence of pretext was enough to infer intentional discrimination and overcome the defendant's judgment as a matter of law); *Hinson v. Clinch County, Ga. Bd. of Educ.*, 231 F.3d 821, 831-32 (11th Cir. 2000) (overturning summary judgment for school principal who produced believable pretext evidence).

A correct application of the *Reeves* standard in this case would have confirmed that Rosado met his burden of proof. There was no evidence "conclusively" showing that, despite the presence of pretext, some other nondiscriminatory reason was Wackenhut's real motivation, or that Rosado's evidence of pretext was weak. This Court's last word as to the correct evidentiary framework in discrimination cases, underscoring that sufficient evidence of pretext can ultimately prove intentional discrimination, should provide the necessary uniformity and guidance that, without formulaic straight-jackets, employment discrimination law requires.[56]

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[56] As has been suggested, "the overall impact on the law is an inherent unfairness for discrimination plaintiffs. The evidentiary burden depends on which circuit the plaintiff brings his or her case. This fundamental issue of civil procedure should be uniform throughout the federal courts . . . To create uniformity the Supreme Court must

(Continued on following page)

– Further Review as to the Applicability of the *Reeves* Standard in the Summary Judgment Context is Warranted

Justice Ginsburg's statement in her concurring opinion in *Reeves* that, it would be "uncommon" to require additional evidence to the combined *prima facie* and pretext in order to defeat a summary judgment also serves to underscore the improper evidence-weighing process (often involving credibility issues) that some post-*Reeves* decisions have shown. ("I write separately to note that it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two categories in order to survive a motion for judgment as a matter of law. I anticipate that such circumstances will be uncommon.") *Reeves*, at 154.

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once again take up the issue of the evidentiary burden for the plaintiff to defeat a motion for summary judgment in a discrimination case. J. Long, *Advocating Pretext Plus: The Impact of Reeves v Sanderson Plumbing Products Inc. on the Shifting Evidentiary Framework*, 51 U. Kan. L. Rev. 629 (2003); See also Brent L. Ryman, *supra* note 49; McCormick, *Truth or Consequences: Why the Rejection of the Pretext Plus Approach to Employment Discrimination Cases in Reeves v. Sanderson Plumbing Establishes the Better Legal Rule*, 21 N. Ill. U. L. Rev. 355, 374 (2001).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 05-1325

AURELIO ROSADO, ET AL.,

Plaintiffs-Appellants,

v.

WACKENHUT PUERTO RICO, INC., ET AL.,

Defendants-Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[Hon. Jose Antonio Fuste, U.S. District Judge]

Before

Lipez, Circuit Judge,
Coffin, Senior Circuit Judge,
Carter,* Senior District Judge,

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* Of the District of Maine, sitting by designation.

Celina Romany, with whom Juan M. Frontera Suau and Celina Romany Law Offices were on brief, for appellants.

José J. Sánchez Vélez, with whom Yldefonso López Morales, Eileen M. García Wirshing and O'Neill & Borges Law Firm were on brief, for appellees.

December 29, 2005

CARTER, Senior District Judge. Plaintiffs/Appellants, Aurelio Rosado, Lydia Rosado, and the conjugal partnership formed between them, filed the present complaint against Defendants/Appellees, Wackenhut Puerto Rico ("WPR") and Wackenhut International, Inc. ("WII") (collectively "the Wackenhut defendants"). Plaintiffs allege violations of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq. (1994 & Supp.2003); the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131 et seq. (1994 & Supp. 2003); and various Puerto Rico statutes. The district court granted Defendants' Motion for Summary Judgment on all counts of Plaintiffs' Verified Complaint. P[illegible]ntiffs appeal.[1]

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[1] In the interest of clarity, we discuss the case with exclusive reference to appellant Aurelio Rosado. However, this opinion is also binding on appellant Lydia Rosado and the conjugal partnership formed between appellants Aurelio and Lydia Rosado.

I.

Facts and Procedural History

The district court accurately summarized the facts as follows. WII is the parent company of WPR, a subsidiary company dedicated to providing security and surveillance services in the Puerto Rico private and public sectors. Mr. Rosado worked at WPR as general manager from January 31, 1989 until July 12, 2002, when he was terminated. As general manager, Mr. Rosado possessed broad responsibility and discretion for WPR's operations, but his actions were ultimately subject to WII corporate headquarters' approval. Mr. Rosado's responsibilities included submitting monthly operations reports, balance sheets, and profit and loss sheets to the Vice-President of WPR Operations, Fernando Hegel, and the President of WII, William Morrow. Mr. Rosado was subject to periodic performance evaluations, and received yearly bonuses based upon his performance and operational results.

During the first several years of Mr. Rosado's managerial guidance, WPR performed well. At its peak, WPR drew $33 million in revenues. Mr. Rosado received positive evaluations and was rewarded with favorable bonuses. Between 1999 and 2001, WPR lost a significant number of government contracts, and revenue dropped by half. While both parties admit that there was recognition that WPR needed to lessen its reliance on government contracts, which were ephemeral, and to instead redirect sales toward the private sector, the Wackenhut defendants and Mr. Rosado each claim that the other party was unresponsive in joining to remedy the problem.

After the conclusion of a fruitless dialogue between Mr. Rosado and the Wackenhut defendants on righting

WPR's ship, in June 2001, Mr. Morrow and Mr. Hegel directed John Griffey, a WII Field Support Operations Special Project Manager, to visit WPR. Mr. Griffey was directed to draft a sensitivity report assessing WPR's operations and issuing recommendations for improvement, based upon his visit to Puerto Rico. The sensitivity report highlighted the need for improved collections, operational efficiency, and increased sales. In late January or early February 2002, Mr. Morrow and Mr. Hegel met with Mr. Rosado in Puerto Rico to discuss how to improve WPR's grim state of affairs. Mr. Morrow strongly expressed his dissatisfaction with WPR's performance and the need for drastic change, and directed Mr. Rosado to submit a comprehensive action plan by the end of February 2002.

Several days after the meeting took place, Mr. Rosado suffered a cardiac arrest.[2] Mr. Rosado was hospitalized and in recovery for approximately fifty-five days before returning to work. Mr. Rosado was unable to work on the action plan during his recovery. Mr. Morrow and Mr. Hegel directed Mr. Griffey, who had become familiar with WPR's operations during his earlier visit, to return to Puerto Rico, assist in the preparation of the WPR action plan, and provide leadership in Mr. Rosado's absence.

Mr. Rosado returned to work in April 2002, but Mr. Griffey remained at WPR. Mr. Rosado claims that WPR employees were now answering exclusively to Mr. Griffey's command and that although when questioned as to his formal role Mr. Griffey was purposefully ambiguous, Mr. Griffey had become WPR's de-facto general manager. Mr.

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[2] This was Mr. Rosado's second heart attack. His first heart attack took place in April 1998.

Rosado claims that while he retained his formal title as general manager, he had lost all authority at WPR.

Shortly after Mr. Rosado returned, Mr. Hegel requested that he review Mr. Griffey's action plan and either approve Mr. Griffey's plan or, in the alternative, submit his own action plan. Mr. Rosado reviewed and, with some reservations, adopted Mr. Griffey's action plan.

In or around May 2002, Miguel Angel Escobar, the President of Wackenhut El Salvador ("WES"), placed a telephone call to Mr. Rosado.[3] During the conversation, Mr. Escobar asked Mr. Rosado, "Why don't you retire?" Mr. Escobar suggested that "things would probably be easier for everyone" if Mr. Rosado retired.

Approximately one month later, Mr. Morrow made the decision to terminate Mr. Rosado. On July 12, 2002, Mr. Hegel informed Mr. Rosado that he was terminated. Upon Mr. Hegel's recommendations, Mr. Morrow appointed Mr. Griffey as the new general manager for WPR.

Mr. Rosado filed the instant action alleging violations of the ADEA, the ADA and various Puerto Rico statutes. The district court granted the Wackenhut defendants' Motion for Summary Judgment on all counts of Mr. Rosado's Verified Complaint.

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[3] Like WPR, WES is a subsidiary of WII. WES's leadership has no authority over WPR.

II.

Summary Judgment Standard

The standard for summary judgment is straightforward and well-established. A district court may enter summary judgment upon a showing "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We review summary judgment rulings de novo, construing the record evidence in the light most favorable to, and drawing all reasonable inferences in favor of, the nonmoving party. *Straughn v. Delta Air Lines, Inc.*, 250 F.3d 23, 33 (1st Cir. 2001); *Feliciano de la Cruz v. El Conquistador Resort & Country Club*, 218 F.3d 1, 5 (1st Cir. 2000). Summary judgment is appropriate when "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). "Even in employment discrimination cases where elusive concepts such as motive or intent are at issue," summary judgment is appropriate if the non-moving party rests "merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Feliciano*, 218 F.3d at 5 (quoting *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir.1990)) (internal quotations omitted). It is within this procedural framework that we assess Mr. Rosado's claims. Our review is not constrained by the lower court's stated rationale; we may affirm the entry of summary judgment on any ground supported by the record. *See Houlton Citizens' Coal. v. Town of Houlton*, 175 F.3d at 178, 184 (1st Cir. 1999).

The ADEA Claim

The ADEA makes it unlawful for an employer to discharge any individual or otherwise discriminate against

him on the basis of his age. *See* 29 U.S.C. § 623(a)(1). Since there is no direct evidence which demonstrates the Wackenhut defendants' alleged discriminatory animus against Mr. Rosado, we must consider the multi-part *McDonnell Douglas* test. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-805 (1973). Applying the *McDonnell Douglas* framework, Mr. Rosado must first "demonstrate that he (1) was at least forty years of age, (2) met the employer's legitimate job performance expectations, (3) experienced adverse employment action; and (4) was replaced by a person with roughly equivalent job qualifications." *Goldman v. First Nat'l Bank of Boston,* 985 F.2d 1113, 1117 (1st Cir. 1993). The record supports the conclusion that Mr. Rosado satisfies the *prima facie* case factors. The burden of production then shifts back to the employer who must rebut the inference of discrimination by articulating some legitimate, non-discriminatory reason for the adverse employment action. *Dominguez-Cruz v. Suttle Caribe, Inc.,* 202 F.3d 424, 430 (1st Cir. 2000). Mr. Rosado admits, and this Court finds, that the Wackenhut defendants have satisfied their burden of production by asserting that Mr. Rosado was discharged because his managerial performance since 1998 was unsatisfactory and because WPR was suffering a lack of effective leadership.

In the final stage of the analysis the burden shifts back to Mr. Rosado to show that the employer's alleged justification was not its true reason for the adverse employment action, but was a mere pretext for age discrimination. *Id.*; *Mesnick v. Gen. Elec. Co.,* 950 F.2d 816, 823 (1st Cir. 1991). The ADEA "does not stop a company from discharging an employee for any reason (fair or unfair) or for no reason, so long as the decision to fire does not stem from the person's age." *Freeman v. Package Mach. Co.,* 865

F.2d 1331, 1341 (1st Cir. 1988). Mr. Rosado must produce evidence beyond the mere assertion that the alleged justification is implausible and show that the employer's discriminatory animus actually motivated the adverse employment action. *See Mesnick,* 950 F.2d at 825.

The record is devoid of any sign that anyone in a decision-making role, including Mr. Morrow and Mr. Hegel, bore any discriminatory animus toward Mr. Rosado. Appellant fails to present evidence necessary to show that the Wackenhut defendants' given reasons for the termination were pretextual. Appellant makes sweeping statements but fails to cite to any material fact in controversy in the record. Although appellant states that "the district court has completely ignored most, if not all, of Plaintiff's pretext evidence," he never discloses what evidence the district court disregarded. Appellant's Brief at 21. Generally, appellant criticizes the district court for missing important considerations such as "the significance of assessing the whole picture, proximity in time, and the employer's control of information." Appellant's Brief at 22. But, here again, he never states what is that pertinent evidence.

Even if we were to consider appellant's unsupported arguments, the evidence fails to create a trial-worthy age discrimination claim. Appellant states that according to Wackenhut corporate officers Mr. Rosado was aware that a sensitivity report was being prepared but Mr. Rosado denies that he knew the reasons for Mr. Griffey's visit to the island. Assuming that there is contradictory testimony on this point, such conflict does not support the inference that the reason given by the Wackenhut defendants for Mr. Rosado's termination was a pretext for age discrimination. Appellant also attempts to draw some inference of

pretext from the February 2002 meeting between Mr. Morrow and Mr. Rosado wherein Morrow discussed the sensitivity report's conclusions with Mr. Rosado, which were apparently unknown to Rosado until that time. However, the fact that Mr. Rosado was kept out of the loop on the sensitivity report does not in any way suggest that the Wackenhut defendants' performance-based reasons for terminating Mr. Rosado were false.

Finally, appellant suggests that when Mr. Morrow asked him to create an action plan for WPR, Mr. Morrow was giving Mr. Rosado an opportunity to improve the company's economic situation. Because he was terminated less than three months after returning to work from the heart attack, appellant suggests that there is sufficient evidence in the record for a trier of fact to conclude that the chance Mr. Morrow gave him was just a false gesture in a discriminatory cover-up scheme. However, the timing of his termination, standing alone or even in conjunction with being kept out of the loop on the sensitivity report, does not in any way suggest that the Wackenhut defendants' performance-based reasons for terminating Mr. Rosado were false. Appellant has not presented any evidence besides his age and Mr. Griffey's presence pointing to age as a factor in his termination. Moreover, appellant has made no attempt to demonstrate that WPR's economic losses under Mr. Rosado's leadership were fabricated by the company to conceal his superiors' discriminatory motives.

The ADA Claim

To establish a claim of disability discrimination under the ADA, a plaintiff must prove, by a preponderance of

evidence, that he (1) was disabled within the meaning of the ADA, (2) was able to perform the essential functions of the job with or without reasonable accommodation, and (3) was discharged by the employer in whole or in part because of his disability. *Jacques v. Clean-Up Group,* 96 F.3d 506, 511 (1st Cir. 1996). Appellant does not allege any direct evidence of disability discrimination. Here again, in the absence of direct evidence, Mr. Rosado may "indirectly" prove his case by "using the *prima facie* case and burden shifting methods originated in *McDonnell Douglas.*" *Jacques,* 96 F.3d at 511 (quoting *Katz v. City Metal Co.,* 87 F.3d 26, 30 n.2 (1st Cir. 1996)).

Under *McDonnell Douglas* Mr. Rosado must demonstrate by a preponderance of evidence that he (1) has a disability within the meaning of the ADA, (2) is qualified to perform the essential functions of the job, with or without reasonable accommodations, (3) was subject to an adverse employment action by a company subject to the ADA, (4) was replaced by a non-disabled person or treated less favorably than non-disabled employees, and (5) suffered damages as a result. *Id.* The district court granted defendants' motion for summary judgment after finding that Mr. Rosado failed to establish a *prima facie* case under the ADA.

Appellant correctly asserts that it is not necessary that he actually be disabled, but that it is sufficient that his employer regarded him as disabled. Considering this theory of liability, the district court found that Mr. Rosado's assertion that he "must have been generally perceived as impaired because of his shortness of breath" was not supported by the record. On appeal Mr. Rosado again contends that the Wackenhut defendants terminated him because he was perceived as being "an old man who had suffered a second heart attack which prevented

him from performing the task required from a manager in the industry." Appellant's Brief at 34. To support this statement, appellant states that anyone observing him after he returned would have noticed physical changes that would have led them to conclude that he was disabled or could not do the job. However, appellant does not cite to any evidence in the summary judgment record that even upon noticing his shortness of breath, anyone entertained the belief that he was disabled. Without providing evidence of a single instance of misperception by any particular person or group of persons, Mr. Rosado can not satisfy his *prima facie* burden under the ADA.

Although appellant suggests that after he returned to work he was universally treated as if he was completely incapable of performing the duties of general manager, his only support for this conclusion is that he was required to have Mr. Griffey authorize his decisions before they became final. Mr. Rosado makes no citation to the evidentiary record to support the assertion that his decisions had to receive prior authorization from Mr. Griffey. However, even if Mr. Griffey was exercising oversight over Mr. Rosado's decisionmaking at WPR, there is no evidence that this is related to a perception by the Wackenhut defendants that Mr. Rosado is disabled rather than to the troubled financial condition of WPR and the corporate effort to implement the action plan, which Mr. Griffey was instrumental in developing. Without record support for the inference that the alleged oversight was in some way connected to Mr. Rosado's shortness of breath, Mr. Rosado can not establish a *prima facie* case under the ADA.

The district court's judgment is *affirmed.*

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

AURELIO ROSADO, et al. Plaintiffs, v. WACKENHUT PUERTO RICO, INC.; et al. Defendants.	Civil No. 03-1737 (JAF)

OPINION AND ORDER

Plaintiffs, Aurelio Rosado, Lydia Rosado, and the conjugal partnership formed between them, filed the present complaint against Defendants, Wackenhut Puerto Rico ("Defendant WPR") and Wackenhut International, Inc. ("Defendant WII").[1] Plaintiff alleges violations of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (1994 & Supp. 2003); the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12165 (1994 & Supp. 2003), and various Puerto Rico statutes. *Docket Document No. 1.*

Defendants move for summary judgment, claiming that Plaintiff cannot meet his burdens under the ADEA and the ADA. *Docket Document No. 15.* In the alternative, Defendant WII requests dismissal under Federal Rule of Civil Procedure 12(b)(6). *Id.* Plaintiff opposes the motion. *Docket Document No. 28.*

[1] In the interest of clarity, we will discuss the case with exclusive reference to Plaintiff Aurelio Rosado. However, this opinion and order is also binding on Plaintiff Lydia Rosado and the conjugal partnership formed between Plaintiffs Aurelio and Lydia Rosado.

I.

Factual and Procedural Synopsis

Unless otherwise indicated, we derive the following factual summary from the parties' statements of facts. *Docket Document Nos. 1, 16, 28.*

WII is the parent company of WPR, a subsidiary company dedicated to providing security and surveillance services in the Puerto Rico private and public sectors. Plaintiff worked at WPR as General Manager from January 31, 1989, until July 12, 2002, when he was terminated. As General Manager, Plaintiff possessed broad responsibility and discretion for WPR's operations, but his actions were ultimately subject to WII corporate headquarters' approval. Plaintiff's responsibilities included submitting monthly operations reports, balance sheets, and profit and loss sheets to the Vice President of WPR Operations, Mr. Fernando Hegel, and the President of WII, Mr. William Morrow. Plaintiff was subject to periodic performance evaluations, and received yearly bonuses based upon his performance and operational results.

During the first several years of Plaintiff's managerial guidance, WPR performed well. At its peak, WPR drew $33 million in revenues. Plaintiff received positive evaluations and was awarded with favorable bonuses. Between 1999 and 2001, WPR lost a significant number of government contracts, and revenue dropped by half. While both parties admit that there was a recognition that WPR needed to lessen its reliance on government contracts, which were ephemeral and unrewarding, and to instead redirect sales toward the private sector, Defendants and Plaintiff each claim that the other party was unresponsive in joining to remedy the problem.

After the conclusion of a fruitless dialogue between Plaintiff and Defendants on righting WPR's ship, in June 2001, Mr. Morrow and Mr. Hegel directed John Griffey, a WII Field Support Operations Special Project Manager, to visit WPR. Mr. Griffey was directed to draft a sensitivity report assessing WPR's operations and issuing recommendations for improvement, based upon his visit to Puerto Rico. The sensitivity report highlighted the need for improved collections, operational efficiency, and increased sales. In late January or early February 2002, Mr. Morrow and Mr. Hegel met with Plaintiff in Puerto Rico to discuss how to improve WPR's grim state of affairs. Mr. Morrow strongly expressed his dissatisfaction with WPR's performance and the need for drastic change, and directed Plaintiff to submit a comprehensive action plan by the end of February 2002.

Several days after the meeting took place, Plaintiff suffered a cardiac arrest.[2] Plaintiff was hospitalized and in recovery for approximately fifty-five days before returning to work. Plaintiff was unable to work on the action plan during his recovery. Mr. Morrow and Mr. Hegel directed Mr. Griffey, who had become familiar with WPR's operations during his earlier visit, to return to Puerto Rico, assist in the preparation of the WPR action plan, and provide leadership in Plaintiff's absence.

Plaintiff returned to work in April 2002, but Mr. Griffey remained at WPR. Plaintiff claims that WPR employees were now answering exclusively to Mr. Griffey's command and that although when questioned as to his

[2] This was Plaintiff's second heart attack. His first heart attack took place on April 15, 1998.

formal role Mr. Griffey was purposefully ambiguous, Mr. Griffey had become WPR's de-facto general manager. Plaintiff claims that while he retained his formal title as general manager, he had lost all authority at WPR.

Mr. Hegel requested that Plaintiff review Mr. Griffey's action plan and either approve Mr. Griffey's plan or, in the alternative, submit his own action plan. Plaintiff reviewed and, with some reservations, adopted Mr. Griffey's action plan.

In or around May 2002, Mr. Miguel Angel Escobar, the President of Wackenhut El Salvador ("WES"), placed a telephone call to Plaintiff.[3] During the conversation, Mr. Escobar asked Plaintiff, "why don't you retire?" Mr. Escobar suggested that "things would probably be easier for everyone" if Plaintiff retired.

Mr. Morrow made the decision to terminate Plaintiff. On July 12, 2002, Mr. Hegel informed Plaintiff that he was terminated. Upon Mr. Hegel's recommendation, Mr. Morrow appointed Mr. Griffey as the new general manager for WPR.

On July 3, 2003, Plaintiff filed the present action. *Docket Document No. 1.* On June 28, 2004, Defendants filed a motion for summary judgment or, in the alternative, dismissal of the claim against WII for failure to state a claim upon which relief can be granted. *Docket Document No. 15.* On August 11, 2004, Plaintiff filed a response in opposition to Defendants' motion for summary judgment and dismissal. *Docket Document No. 40.*

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[3] Like WPR, WES is a subsidiary of WII. WES's leadership has no authority over WPR.

II.

Motion for Summary Judgment Standard under Rule 56(c)

The standard for summary judgment is straightforward and well-established. A district court should grant a motion for summary judgment "if the pleadings, depositions, and answers to the interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgement as a matter of law." FED. R. CIV. P. 56(c); *see Lipsett v. Univ. of P.R.*, 864 F.2d 881, 894 (1st Cir. 1988). A factual dispute is "material" if it "might affect the outcome of the suit under the governing law," and "genuine" if the evidence is such that "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The burden of establishing the nonexistence of a genuine issue as to a material fact is on the moving party. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986). This burden has two components: (1) an initial burden of production, which shifts to the nonmoving party if satisfied by the moving party; and (2) an ultimate burden of persuasion, which always remains on the moving party. *See id.* In other words, "[t]he party moving for summary judgement, bears the initial burden of demonstrating that there are no genuine issues of material fact for trial." *Hinchey v. NYNEX Corp.*, 144 F.3d 134, 140 (1st Cir. 1998). This burden "may be discharged by showing that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. After such a showing, the "burden shifts to the nonmoving party, with respect to each issue on which he has the burden of proof, to demonstrate that a trier of fact reasonably could find in

his favor ." *DeNovellis v. Shalala,* 124 F.3d 298, 306 (1st Cir. 1997) (citing *Celotex,* 477 U.S. at 322-25).

Although the ultimate burden of persuasion remains on the moving party and the court should draw all reasonable inferences in favor of the nonmoving party, the nonmoving party will not defeat a properly supported motion for summary judgment by merely underscoring the "existence of some alleged factual dispute between the parties;" the requirement is that there be a genuine issue of material fact. *Anderson,* 477 U.S. at 247-48; *Goldman v. First Nat'l Bank of Boston,* 985 F. 2d 1113, 1116 (1st Cir. 1993). In addition, "factual disputes that are irrelevant or unnecessary will not be counted." *Anderson,* 477 U.S. at 248. Under Rule 56(e) of the Federal Rules of Civil Procedure, the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); *see also Anderson,* 477 U.S. at 256. Summary judgment exists to "pierce the boilerplate of the pleadings," *Wynne v. Tufts Univ. Sch. of Med.,* 976 F.2d 791, 794 (1st Cir. 1992), and "determine whether a trial actually is necessary." *Vega-Rodriguez v. P.R. Tel. Co.,* 110 F.3d 174, 178 (1st Cir. 1997).

III.

Analysis

Defendants argue that we should grant summary judgment because the facts alleged by Plaintiff are insufficient, as a matter of law, to support an ADEA and/or ADA claim for relief. Defendants also argue that the claim against WII should be dismissed under Rule 12(b)(6) because WII, as a parent corporation, "does not control the

employment practices and decisions of WPR, [and therefore] should not be held liable for the alleged acts of its subsidiary." *Docket Document No. 15.* Because we find that Plaintiff's allegations are insufficient to establish an ADEA or ADA claim, we need not reach the Rule 12(b)(6) issue.[4]

A. ADA Claim

1. Absence of Direct Evidence

To establish a claim of disability discrimination under the ADA, a plaintiff must prove, by a preponderance of the evidence, that he (1) was disabled within the meaning of the ADA, (2) was able to perform the essential functions of the job with or without reasonable accommodation, and (3) was discharged by the employer in whole or in part because of his disability. *Jacques v. Clean-Up Group,* 96 F.3d 506, 511 (1st Cir. 1996). Plaintiff fails to submit any allegations that can be construed as direct evidence that he was discharged because of a disability. In the pleadings, Plaintiff addresses only the first and second prongs of the direct evidence test, and fails to allege direct evidence of discriminatory discharge. *Docket Document Nos. 1, 27.* Plaintiff states only that "a reasonable jury could conclude, from the evidence in the record, and from the reasons given by Defendants for Plaintiff's termination, that Defendant acted because [Plaintiff] was an old man who had suffered a second heart attack which prevented him from performing the task required from a manager in

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[4] Since we do not consider the motion to dismiss, we also do not reach the concerns articulated in Plaintiffs' motion requesting order to strike Defendants' memorandum. *Docket Document No. 19.*

the industry." *Docket Document No. 27.* This declaration is grossly insufficient to constitute direct evidence of disability discrimination. *Anderson,* 477 U.S. at 247-248, 256; *Medina-Munoz v. R.J. Reynolds Tobacco Co.,* 896 F.2d 5, 8 (1st Cir. 1990).

2. Burden-shifting Framework

In the absence of direct evidence, a plaintiff may also "indirectly" prove his or her case by "using the prima facie case and burden shifting methods that originated in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973)." *Jacques,* 96 F.3d at 511 (quoting *Katz v. City Metal Co.,* 87 F.3d 26, 30 n.2 (1st Cir. 1996)). A plaintiff may proceed under *McDonnell* by demonstrating by a preponderance of the evidence that he (1) has a disability within the meaning of the ADA, (2) is qualified to perform the essential functions of the job, with or without reasonable accommodations, (3) was subject to an adverse employment action by a company subject to the ADA, (4) was replaced by a non-disabled person or treated less favorably than non-disabled employees, and (5) suffered damages as a result. *Id.*; *Jacques,* supra; *Katz,* supra.

The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desired." 42 U.S.C. § 12111(8). A "disability" is (i) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (ii) a record of such an impairment; or (iii) being regarded as having such an impairment. 42 U.S.C. § 12102(2). Merely having a physical impairment does not make an

individual disabled for purposes of the ADA. *Toyota Motor Mfg., Ky. v. Williams,* 534 U.S. 184, 195 (2002). A claimant also needs to prove that the impairment limits a major life activity. *Id.* A relevant illustration of a "major life activity" is "performing manual tasks." *Id.* To be substantially limited in performing manual tasks, an individual "must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." *Id.* at 198. Manual tasks that are unique to any particular job are not of necessity important parts of most people's lives. *Id.* at 201. Ultimately, "[w]hether a person has a disability under the ADA is an individualized inquiry." *Sutton v. United Air Lines,* 527 U.S. 471, 483 (1999).

Defendants submit that Plaintiff has "failed to demonstrate that his heart condition poses any impairment or substantial limitation in his ability to perform any major life activities." *Docket Document No. 15.* Defendants are correct to focus on the degree to which Plaintiff was impaired (if at all) rather than the heart condition itself. "A medical diagnosis is insufficient to prove that an impairment is substantially limiting a major life activity; plaintiffs must present 'evidence that the extent of the limitation [caused by the impairment] in terms of their own experience is substantial.' . . . The inability to perform tasks such as washing cars, taking care of the back yard, playing with children, and driving long distances does not amount to such severe restrictions to qualify as major life activities." *Soler v. Tyco Elec., Inc.,* 268 F. Supp.2d 97, 105 (D.P.R. 1997) (quoting *Williams,* 534 U.S. at 197-98, 202). "[T]he EEOC has defined 'major life activities' to include 'functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing,

learning, and working.'" *Gillen v. Fallon Ambulance Serv.*, 283 F.3d 11, 21 (1st Cir. 2002) (quoting 29 C.F.R. § 1630.2(i) (1991)).

Plaintiff asserts that subsequent to his second heart attack, he experienced chronic shortness of breath, implicitly arguing that his breathing difficulty "substantially limit[ed]" a life activity within the ADA's statutory meaning. *Docket Document No. 27*; *Gillen*, 283 F.3d at 21. Plaintiff supports his claim by referring to Dr. Ricardo Miranda Rodriguez' deposition, in which Dr. Rodriguez described Plaintiff's condition as "mild respiratory distress." *Docket Document No. 27, Exh. 1.* Dr. Rodriguez noted that Plaintiff's condition was not so severe as to be described as "laboring while breathing," and even agreed that it would be difficult to attribute the breathing shortness to Plaintiff's recent heart attack, as opposed to a pulmonary condition common among chronic smokers. *Id.*

Plaintiff's impairment claim, even if assumed as true, fails to impress this court as obviously sufficient for the purposes of establishing an ADA prima facie case. Plaintiff makes no assertion that the mild breath shortness "significantly restricted as to the condition, manner or duration under which [Plaintiff could] perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." *Gillen*, supra (citing 29 C.F.R. § 1630.2(j)). In inquiring into whether Plaintiff was substantially limited, we search in vain for any "significant obstacles." *Gillen*, 283 F.3d at 22. Plaintiff's assertion that he could not walk "without having to take several stops to catch his breath," *Docket Document No. 27*, is insufficient insofar as it establishes an impairment that interferes "in only a minor way with

the performance of manual tasks." *Williams,* 534 U.S. at 197. Additionally, Plaintiff fails to assert the condition's permanence, which is necessary to support a disability claim. *Id.*; *Katz,* 87 F.3d at 30.

Plaintiff correctly observes that the mere perception of impairment can be sufficient for the purpose of satisfying the ADA disability definition. *Docket Document No. 27,* 42 U.S.C. § 12102(2)(C). In order for Plaintiff to obtain redress under § 12102(2)(C), "it is necessary that a covered entity entertain misperceptions about the individual – it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting." *Sutton,* 527 U.S. at 490. While Plaintiff quotes extended passages from *Sutton* and from § 12102(2)(C), Plaintiff does not allege that anyone entertained a mistaken belief that he was impaired. Rather, Plaintiff merely asserts that he must have been generally perceived as impaired because of his shortness of breath. *Docket Document No. 27.* Without pleading a single instance of misperception by any particular person or group of persons, Plaintiff will not satisfy his prima facie burden via reference to 42 U.S.C. §12102(2)(C). *Sutton,* 527 U.S. at 490; *Santiago Clemente v. Executive Airlines, Inc.,* 213 F.3d 25, 30 (1st Cir. 2000); FED. R. CIV. P. 56(e) (the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial").

Because Plaintiff has failed to clearly establish a disability, he has not successfully established a prima facie case of discrimination, and we will not proceed with the

McDonnell burden-shifting analysis of Plaintiff's ADA claim.

B. ADEA Claim

1. Absence of Direct Evidence

The ADEA makes it unlawful for an employer to discharge any individual or otherwise discriminate against him on the basis of her age. 29 U.S.C. § 623(a) (1). Here, there is no direct evidence or "smoking gun" which demonstrates Defendants' alleged discriminatory animus against Plaintiff. Plaintiff's allegation that WES President Escobar brought up the issue of retirement is not probative. *Santiago v. Canon U.S.A., Inc.,* 138 F.3d 1, 6 n.8 (1st Cir. 1998) Plaintiff has not alleged, let alone shown, how the one allegedly discriminatory statement made by an official of another WII subsidiary company was "made by a decisionmaker, pertained to the decisional process, bore squarely on the employment decisions at issue . . . and straightforwardly conveyed age animus." *Febres v. Challenger Caribbean Corp.,* 214 F.3d 57, 61 (1st Cir. 2000). We must, therefore, consider the multi-factor test established by the Supreme Court in *McDonnell Douglas.*

2. Burden-shifting Framework

Plaintiff "must demonstrate that he (1) was at least forty years of age, (2) met the employer's legitimate job performance expectations, (3) experienced adverse employment action, and (4) was replaced by a person with roughly equivalent job qualifications." *Goldman,* 985 F.2d at 1113; *see also Suarez v. Pueblo Int'l, Inc.,* 229 F.3d 49, 53 (1st Cir. 2000); *Febres v. Challenger Caribbean Corp.,* 214 F.3d 57, 61 (1st Cir. 2000). Once the plaintiff establishes a

prima facie case, the presumption arises that the employer unlawfully discriminated against him. *Gonzalez v. El Dia, Inc.*, 304 F.3d 63, 68-69 (1st Cir. 2002); *Vega v. Kodak Caribbean, Ltd.*, 3 F.3d 476, 478 (1st Cir. 1993). The burden of production then shifts back to the employer-defendant who must rebut the inference of discrimination by articulating some legitimate, non-discriminatory reason for the adverse employment action. *Dominguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 430 (1st Cir. 2000).

If the employer meets this burden, the inference of unlawful discrimination is dispelled, and the burden shifts to the plaintiff to show that the employer's alleged justification is a mere pretext for discrimination. *Id.*; *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 823 (1st Cir. 1991). At this stage, the plaintiff must produce evidence beyond the mere assertion that the alleged justification is implausible and show that the employer's discriminatory animus actually motivated the adverse employment action. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993); *Mesnick*, 950 F.2d at 825. Throughout this analysis, the plaintiff must prove that he would not have suffered the adverse employment action but for his membership in a protected class. *See Freeman v. Package Mach.*, 865 F. 2d 1331, 1335 (1st Cir. 1988). Thus, federal law "does not stop a company from discharging an employee for any reason (fair or unfair) or for no reason, so long as the decision to fire does not stem from the person's age." *Id.* at 1341.

a. Plaintiff's Prima Facie Case

Plaintiff was over forty years old at the time of an adverse employment action, and was replaced by another employee. *Docket Document No. 28.* The only remaining

prima facie inquiry is whether Plaintiff was qualified to perform the essential functions of the job. *See Texas Dept. of Cmty. Affairs v. Burdine,* 450 U.S. 248, 253 (1981); *Calero-Cerezo v. U.S. Dept. of Justice,* 355 F.3d 6, 22 (1st Cir. 2004). Plaintiff points to years of favorable performance reviews and generous bonuses to demonstrate that he was amply qualified to perform. *Docket Documents No. 27, 28.* Defendant maintains that the last several years of Plaintiffs' employment was disappointing, *Docket Document No. 15,* but Plaintiffs' assertions will suffice for the purpose of satisfying the prima facie burden. *Burdine,* 450 U.S. at 253.

b. Defendants' Rebuttal

Defendants are now pressed to rebut the inference of discrimination by articulating some legitimate, non-discriminatory reason for the adverse employment action. *See Dominguez-Cruz,* 202 F.3d at 430. "This burden is one of production, not persuasion; it 'can involve no credibility assessment.'" *Reeves v. Sanderson Plumbing Prod., Inc.,* 530 U.S. 133, 142 (2000) (quoting *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 509 (1993)). As Plaintiff readily concedes, *Docket Document No. 27,* Defendants easily satisfy their burden requirements by asserting that Plaintiff was discharged because his managerial performance since 1998 was unsatisfactory, and because WPR was suffering a lack of effective leadership. *Docket Document No. 15.* The record is so colored with evidence of WPR's troubled financial health, and with WII President Morrow's growing impatience with WPR's lackluster performance, that Defendants' rebuttal hardly requires further discussion. *Docket Document Nos. 1, 15, 16, 27, 28.* Mr. Morrow and Mr. Hegel's concern prompted the commission

of Mr. Griffey's sensitivity report in late summer 2001. Plaintiff admits of his "tense" interactions with Mr. Morrow, and even admits that immediately prior to the heart attack which supposedly supports Plaintiff's ADA claim, he was subject to "scolding" and the "threat" that WPR would be shut down if he did not succeed in righting WPR's ship. *Docket Document No. 27.* Plaintiff may be justified in disagreeing with Defendants' displeasure with Plaintiff's managerial performance; our function is not to sit as a "super-personnel department that reexamines an entity's business decisions." *See Gonzalez,* 304 F.3d at 69 (citing *Mechnig v. Sears, Roebuck & Co.,* 864 F.2d 1359, 1365 (7th Cir. 1988)). Defendants' growing dissatisfaction with Plaintiff's work performance, both before and after the heart attack, clearly serve to satisfy Defendants' *McDonnell* burden.

c. Defendant's Justification as a Pretext

"'[T]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.' And in attempting to satisfy this burden, the plaintiff – once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision – must be afforded the 'opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'" *Reeves,* 530 U.S. at 143 (quoting *Burdine,* 450 U.S. at 253). Plaintiff adduces no evidence to support the claim that Defendants' reasons for terminating Plaintiff were pretextual. Instead, Plaintiff merely reiterates the sequence of events leading to his termination and labels Defendants'

narrative as contradictory. *Docket Document No. 27.* Plaintiff also argues that his attempts at saving WPR were frustrated by WII leadership's lack of responsiveness, and that he was unjustly blamed for matters beyond his control. *Id.* Plaintiff's concern that he was a scapegoat for the company's problems may, for all we know, be entirely justified. Alternatively, Plaintiff may be entirely to blame for WPR's woes. However, whether or not Plaintiff was a scapegoat is irrelevant unless Plaintiff alleges that he was scapegoated due to illegal discrimination. *Hicks,* 509 U.S. at 519. ("[T]he factfinder must believe the plaintiff's explanation of intentional discrimination."); *Freeman,* 865 F.2d at 1341. The record is bereft of any sign that anyone in a decision-making role, including Mr. Morrow and Mr. Hegel, bore any discriminatory animus whatsoever. *Docket Document No. 27.* The sequence of events, as portrayed by both parties, demonstrates a gradual souring of Plaintiff's relationship with Mr. Morrow that bears no obvious nexus to Plaintiff's age or, for that matter, alleged disability. *Docket Document Nos. 1, 15, 16, 27, 28.* Plaintiff fails to present the "definite, competent evidence" necessary to show that Defendants' given reasons for the termination were pretextual. *Mesnick,* 950 F.2d at 822. "It is not enough for a plaintiff merely to impugn the veracity of the employer's justification; he must 'elucidate specific facts which would enable a jury to find that the reason given is not only a sham, but a sham intended to cover up the employer's real motive." *Id.* at 824 (citing *Medina-Munoz,* 896 F.2d at 9); *see also LeBlanc v. Great Am. In. Co.,* 6 F.3d 836, 843 (1st Cir. 1996) ("The plaintiff cannot avert summary judgment if the record is devoid of adequate direct or circumstantial evidence of discriminatory animus on the part of the employer."). Therefore, we grant Defendants' summary judgment motion.

C. Supplemental Jurisdiction

Because all of Plaintiff's federal claims have been dismissed, we decline to exercise supplemental jurisdiction over Plaintiff's associated state-law claims. *Rivera v. Murphy,* 979 F.2d 259, 264 (1st Cir. 1992) (quoting *Cullen v. Mattaliano,* 690 F. Supp. 93 (D. Mass. 1988) ("[I]t is the settled rule in this Circuit that in a non-diversity case, where pendent state claims are joined with a federal cause of action and that the federal cause of action is [dismissed] . . . the pendent state claims should be dismissed.")).

IV.

Conclusion

In accordance with the foregoing, we **GRANT** Defendants' motion for summary judgment. *Docket Document No. 15.* Plaintiff's ADEA and ADA claims are **DISMISSED WITH PREJUDICE**. Plaintiff's state law causes of action are **DISMISSED WITHOUT PREJUDICE**. Judgment shall be entered accordingly.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 12th day of January, 2005.

S/Jose Antonio Fuste
JOSE ANTONIO FUSTE
Chief U. S. District Judge

United States Court of Appeals
For the First Circuit

No. 05-1325

AURELIO ROSADO, ET AL.,

Plaintiffs-Appellants,

v.

WACKENHUT PUERTO RICO, INC., ET AL.,

Defendants-Appellees.

JUDGMENT

Entered: December 29, 2005

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's judgment is affirmed.

Certified and Issued as Mandate under Fed. R. App. P. 41.

Richard Cushing Donovan, Clerk

/s/ [Illegible]
Deputy Clerk

Date: 2/14/06

By the Court:

Richard Cushing Donovan, Clerk

MARGARET CARTER

By: Margaret Carter, Chief Deputy Clerk

[cc: Celina Romany, Esq., Juan M. Frontera Suau, Esq., Jose J. Sanchez Velez, Esq., Eileen M. Garcia Wirshing, Esq. and Yldefonso Lopez Morales, Esq.]

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United States Court of Appeals
For the First Circuit

No. 05-1325

AURELIO ROSADO; LYDIA ROSADO;
CONJUGAL PARTNERSHIP ROSADO-ROSADO

Plaintiffs-Appellants

v.

WACKENHUT PUERTO RICO, INC.;
WACKENHUT INTERNATIONAL, INC.

Defendants-Appellees.

Before

Boudin, *Chief Judge,*
Coffin, *Senior Circuit Judge,*
Torruella, Selya, Lynch,
Lipez and Howard, *Circuit Judges,*
Carter, *Senior District Judge.*

ORDER OF COURT

Entered: February 6, 2006

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the

petition for rehearing and the petition for rehearing en banc be denied.

By the Court:
Richard Cushing Donovan, Clerk

By: /s/ JULIE GREGG
Julie Gregg, Operations Manager

[cc: Celina Romany Siaca, Esq., Juan M. Frontera-Suau, Esq., Jose J. Sanchez Velez, Esq., Eileen Garcia-Wirshing, Esq., Yldefonso Lopez Morales, Esq.]